SUPREME COURT, U. S.

No. 948

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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CITIZENS CASUALTY COMPANY OF NEW YORK,

Petitioner,

v.

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Respondent.

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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Petitioner, Citizens Casualty Company of New York, prays that a writ of certiorari issue to review the final order of the Court of Appeals for the State of New York entered on July 1, 1970.

## Opinions Below

The final order of the Court of Appeals affirmed without opinion the order and judgment of the Appellate Division of the Supreme Court of the State of New York, First Department, filed on March 23, 1970. The order and judgment of the Appellate Division was filed in conformity with its decision and findings dated March 12, 1970. A copy of the order of the Court of Appeals is appended to this petition as Appendix A. A copy of the decision and findings of the Appellate Division is appended to this petition as Appendix B.

## Jurisdiction

The order of the Court of Appeals was dated and entered on July 1, 1970. On September 24, 1970, Mr. Justice Harlan granted petitioner an extension of time until November 9, 1970 to file this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

## Question Presented

Whether the Appellate Division's findings and decision, as affirmed by the Court of Appeals, resulted in an unconstitutional taking of petitioner's property, where the Appellate Courts ignored the proof of petitioner's solvency as of the time of a constitutionally mandated "full hearing".

## Constitutional Provision

Article XIV, Section 1 of the United States Constitution provides in pertinent part that:

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Statement

In April, 1968 the respondent, as Superintendent of Insurance, petitioned the Supreme Court of the State of New York for an order, pursuant to Article XVI of the New York Insurance Law, to rehabilitate the petitioner because of its alleged insolvency.* After a summary

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*Unless otherwise indicated, reference to any statute or Article is to the New York Insurance Law contained in Vol. 27, McKinney's Consolidated Laws of New York.

proceeding, the Supreme Court granted the respondent's petition, which decision was affirmed by the Appellate Division, First Department. The Court of Appeals reversed and remanded for further proceedings, holding that the petitioner had not been afforded a "full hearing" on the issue of its solvency, in accordance with due process and Section 326 of the Insurance Law.*

In December 1969, the trial court dismissed the respondent's petition holding that he had failed to establish his entitlement to the relief sought. The Appellate Division reversed on the law and facts and entered an order and judgment granting the respondent's petition, which order and judgment was affirmed without opinion by the Court of Appeals.**

In the *Second Stewart Appeal*, the Appellate Division found that the petitioner was insolvent as of December 31, 1967 and 1968, but ignored the petitioner's proof of its solvency as of the constitutionally mandated "full hearing".

The petitioner has been in business for more than forty years, was licensed in forty-seven states, had assets of approximately $15,000,000 in 1968, and premium income of $11,000,000 for the same year. Even though the petitioner had no premium income after April 1968, on account of this litigation, it continued to pay all proper claims in due course until March 1970, when it was restrained from doing so by the Appellate Division. At the trial in November 1969, the petitioner demonstrated by testimony and documentary evidence that between December 1968 and September 1969 it had tried, settled and

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* *Matter of Stewart (Citizens Cas. Co. of N. Y.)*, 23 N. Y. 2d 467, 244 N. E. 2d 690, 297 N.Y.S. 2d 115 (1968) (cited hereafter as the *First Stewart Appeal*).

** *Stewart* v. *Citizens Casualty Company of New York*, 27 N. Y. 2d 685, 262 N. E. 2d 215, 314 N.Y.S. 2d 7 (1970), *affirming* 34 A. D. 2d 525, 308 N.Y.S. 2d 513 (1st Dep't 1970) (cited hereafter as the *Second Stewart Appeal*).

disposed of thousands of cases, thereby greatly decreasing the amount of reserves necessary under the law. In addition, the petitioner proved that, on the basis of the actual disposition of thousands of claims during 1969, the reserves demanded by the respondent were about $2,500,000 *more* than the claims were actually settled for, and that the amounts actually paid out in 1969 were several hundred thousand dollars *less* than the petitioner's own reserves.

The Appellate Division ignored the petitioner's proof of its solvency. Consequently, the constitutional issue first arose upon the decision and findings of that Court on March 12, 1970. The issue was raised before the Court of Appeals in the petitioner's brief and argument.

## Reasons for Granting the Writ

On the *First Stewart Appeal*, the Court of Appeals held that Section 526 and due process require a "full hearing", having "reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts", *before* the making of an order of rehabilitation.* The Court rejected the respondent's argument that Section 526 and due process were satisfied because the petitioner, pursuant to Section 512(3), was entitled to a "full hearing" in a termination proceeding *after* the entry of a rehabilitation order.**

The Appellate Division in its decision and findings in the *Second Stewart Appeal* failed to consider the condition of the petitioner *at* the time of the mandated "full hearing."

Thus, the Appellate Division ignored the petitioner's proof that the respondent's demand for reserves for 1969

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* *Matter of Stewart* (*Citizens Cas. Co.*), *supra* at 414, 244 N. E. 2d at 693, 297 N.Y.S. 2d at 120.

** *Id.* at 418, 244 N. E. 2d at 696, 297 N.Y.S. 2d at 124.

was $2,500,000 *more* than the amount the claims were actually settled for, and ignored the petitioner's proof of its actual condition as of September 1969. The Appellate Division, by limiting its determination to the period ending December 31, 1968, conducted its own summary proceeding denying the petitioner the "full hearing" ordered on the *First Stewart Appeal* and mandated by due process. *Morgan* v. *United States*, 304 U. S. 1 (1938); *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292 (1937).

In a rehabilitation proceeding, which is an equitable form of action, the New York Appellate Courts were bound "to consider the history of the [petitioner] subsequent to the filing" of the petition for rehabilitation. *Equitable Life Assurance Soc.* v. *Brown*, 213 U. S. 25, 41-42 (1909). The reasons for such a consideration were stated by Mr. Justice Peckham as follows:

> "[I]t is yet proper to consider the history of the defendant subsequent to the filing of the bill by complainant, with reference to the results which might and probably would follow a decree of the court in accordance with the demand of the complainant. The corporation is one of the largest in the world with its more than half million policyholders, its outstanding risks of an amount almost impossible to appreciate, and with assets and liabilities and surplus, reaching into hundreds of millions of dollars in amount. The defendant is in its nature a public institution, and the interests of its policyholders are directly involved in any proceeding looking towards its winding up, and indirectly the interests of many hundreds of thousands of individuals connected with the policyholders as objects of their bounty . . . [I]t has happened that since 1905 a new board of directors has been chosen, new officers placed in command and probably an entirely new policy adopted and followed. Although these last-mentioned facts have happened since the filing of the bill in 1905, nevertheless it is

not improper to refer to them, as they only constitute a history of the defendant since that time. They are found in public documents in New York, filed and existing of record in its insurance department, and they are the sworn returns of the officers of the defendant made since the change in 1906. They may be referred to, not to contradict the averments of the bill, but to show the officers now in control of the management of the defendant, its present condition, and the fact that it is now in full operation and in the daily discharge of all its obligations as they are presented. The right to an accounting in equity and the winding up of the defendant under these circumstances would have to be most clearly made out before such relief would be granted. A court of equity is bound to consider these facts before it would grant relief of the nature demanded.'"*

By ignoring the petitioner's proof of its solvency as of the date of the constitutionally mandated "full hearing", the New York Appellate Courts have denied the petitioner and its thousands of policyholders due process.

## CONCLUSION

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

November 6, 1970.

Respectfully submitted,

CHARLES S. DESMOND,
Attorney for Petitioner.

Of Counsel:

MARIO BIAGGI,
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THOMAS P. GILHOOLEY.

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* *Ibid.*

Appendix A.

# Court of Appeals

**STATE OF NEW YORK**

**July 1, 1970**

**Appeal from Supreme Court**

**Appellate Division—First Department**

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**Richard E. Stewart, as Superintendent of Insurance of the State of New York,**

**Respondent,**

**v.**

**Citizens Casualty Company of New York,**

**Appellant,**

***and***

**Coordinated Coverage Corp., et al.,**

**Intervenors.**

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**Order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is, affirmed, without costs.**

**All concur.**

Appendix B.

# Supreme Court

## OF THE STATE OF NEW YORK

### APPELLATE DIVISION—FIRST DEPARTMENT

March 12, 1970

Appeal from Supreme Court
Trial Term, New York County

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RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Petitioner-Appellant,

v.

CITIZENS CASUALTY COMPANY,

Respondent-Respondent,

*and*

COORDINATED COVERAGE CORP., et al.,

Intervenors.

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PER CURIAM.

Judgment, entered January 5, 1970, dismissing the petition in a proceeding pursuant to section 511 of the Insurance Law for an order of rehabilitation of the respondent on the ground of insolvency, unanimously reversed, on the facts and on the law, without costs and without disbursements, and the relief sought in the petition granted.

The petition of the Superintendent of Insurance to take over and rehabilitate the respondent Citizens Casualty Company of New York upon the ground of its insolvency

as of December 31, 1967, was initiated in April 1968. This court in July 1968 affirmed an order of the Supreme Court directing the Superintendent to take possession of Citizens, one Justice dissenting and voting to remand on the ground that the respondent had been denied a full hearing. (Mtr. of Stewart v. Citizens Cas. Co., 30 A. D. 2d 293, 291 N.Y.S. 2d 465.)

In December 1968 the order of affirmance of the Appellate Division was reversed by the Court of Appeals (three Judges dissenting) and the case was remanded to give the insurer an opportunity upon a full hearing to present its evidence of solvency. (Mtr. of Stewart v. Citizens Cas. Co., 23 N. Y. 2d 407, 297 N.Y.S. 2d 115, 244 N. E. 2d 690.) Prior to the retrial under review, the respondent insurer amended its answer to plead affirmative defenses of solvency as of December 31, 1968 and as of August 31, 1969.

The retrial took some twelve days in November and December 1969. The respondent insurer did not dispute the findings of the petitioner's examiners concerning the assets of the respondent as of December 31, 1967 and December 31, 1968. Nor was there dispute with respect to the liabilities of the respondent other than the adequacy of reserves required to be maintained as of those dates. Further limiting the area of controversy, the adequacy of the reserves was contested solely with reference to the reserves required for unknown losses (Insurance Law, § 326(2) (b)). Reserves for unknown losses are bulk reserves established on an "in perpetuity" basis. They are made up of "A & R" ("additional and reopened") claims and "IBNR" ("incurred but not reported") claims. The only evidence adduced by the respondent with respect to the "in perpetuity" reserves was that of an independent expert certified public accountant who testified with reference to the data supplied to him by the respondent. The report of this expert, admitted in evidence over objection, bore the following preface: "We did not make an audit in accordance with generally accepted auditing standards

and accordingly can express no opinion as to the amount of the A & R and IBNR provisions for loss and loss expense calculated by us, losses developed by Citizens or the validity of the data used in our calculations." Nevertheless, even if petitioner's figures for the "in perpetuity" reserve be reduced to those as testified to by this expert, the respondent would still be insolvent as of December 31, 1968 by a sum in excess of three million dollars.

Following the remittitur by the Court of Appeals, the respondent neglected to have a complete audit made of its records of account as of any particular date. The status of its business as one having an excess of assets over required reserves and other liabilities, was never established. It failed to prove its defense of solvency as of December 31, 1968, or as of any other date subsequent thereto.

We find upon the evidence adduced at this full hearing that:

1. The respondent was insolvent as of December 31, 1967 in the minimum amount of $4,490,808.82 within the meaning of section 93, Insurance Law.

2. The respondent was insolvent as of December 31, 1968 in the minimum amount of $5,269,693.46 within the meaning of section 93, Insurance Law.

3. The respondent failed to prove its own solvency at any time.

4. The respondent failed to repair capital impairment despite lawful demands made therefor by the petitioner pursuant to section 94, Insurance Law, and consequently is liable to rehabilitation on the grounds stated in that section and section 511(c) and (e) of the Insurance Law.

5. The petitioner is entitled to a judgment for the rehabilitation of the respondent upon the grounds stated in sections 93, 94 and 511(a), (c) and (e) of the Insurance Law.

Settle judgment on notice.